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THE CHALLENGE OF A MODEL PENAL CODE †

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FOR almost twenty years the American Law Institute's agenda of unfinished business has included a proposal to prepare a model penal code.[1] The project was renewed in 1951, with the support of an Advisory Committee drawn from the law and other disciplines concerned with social aspects of behavior. The Rockefeller Foundation has now granted funds which will permit the undertaking to proceed.[2] The purpose of this article is to describe

† This article is based on two memoranda prepared for the Advisory Committee on Criminal Law of the American Law Institute: *The Proposal to Prepare a Model Penal Code* and *The Possibilities of the Model Penal Code Proposal.*

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[1] The project was first advanced in 1931 by a Joint Committee on Improvement of Criminal Justice composed of representatives of the American Bar Association, the American Law School Association and the American Law Institute, with the endorsement of the Bar Association and the schools. See 56 A.B.A. REP. 25, 494, 513 (1931). It was supported in 1934 after a year of study by an able Advisory Committee on Criminal Justice, whose report to the Institute was approved. *Report in Relation to the Future Work of the Institute*, 12 PROCEEDINGS A.L.I. 369 *et seq.* (1935). A study of the defects of American criminal law was begun by the Institute as early as May, 1923. See A.L.I., A SURVEY AND STATEMENT OF THE DEFECTS IN CRIMINAL JUSTICE (1925). The Institute completed a model Code of Criminal Procedure in 1930. See A.L.I., CODE OF CRIMINAL PROCEDURE (1931).

[2] The Institute has designated an Advisory Committee, the members of which are: Sanford Bates, James V. Bennett, Curtis Bok, Charles D. Breitel, Ernest W. Burgess, Leonard S. Cottrell, Jr., George H. Dession, Stanley H. Fuld, Sheldon Glueck, Manfred S. Guttmacher, Jerome Hall, Albert J. Harno, Kenneth D. Johnson, Thomas D. McBride, Jerome Michael, Winfred Overholser, John J. Parker, Timothy N. Pfeiffer, Orie L. Phillips, Morris Ploscowe, David Riesman, Joseph Sarafite, Thorsten Sellin, Joseph Sloane, Floyd E. Thompson, Lionel Trilling, John B. Waite, with Harrison Tweed and Herbert F. Goodrich, *ex officio.*

The author has been appointed Reporter and Louis B. Schwartz and Paul W. Tappan, Associate Reporters.

the bases and the scope of the work planned. It is presented in the hope that it will fortify professional support for fundamental re-examination of the penal law.[3]

I. Need for Re-examination of the Penal Law

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.

A. Lack of Comprehensive Treatment of Penal Law

Despite its cardinal importance, penal law in the United States has never had the type of specialized attention that has nurtured the development of private law and those aspects of public law that bear directly on the regulation of important economic interests. The best minds of the bar have had small genuine professional involvement with the law of crimes, notwithstanding the brief interludes of prosecution that have sometimes marked the unfolding of a bright career. Aloofness of the bar has been reflected in the schools. No Williston or Wigmore has undertaken to chart the contours of the subject, ordering its doctrines, rules and practice in the light of underlying policies and bringing critical intelligence to bear upon the whole.[4] The volume and

[3] For other discussions in earlier stages of the project, see Gausewitz, *Considerations Basic to a New Penal Code*, 11 Wis. L. Rev. 346, 480 (1936); Glueck, *Principles of a Rational Penal Code*, 41 Harv. L. Rev. 453 (1928), reprinted in Crime and Correction 72 (1952); J. Hall, *Criminology and a Modern Penal Code*, 27 J. Crim. L. & Criminology 1 (1936); Harno, *Rationale of a Criminal Code*, 85 U. of Pa. L. Rev. 549 (1937).

[4] See Pound, *Toward a Better Criminal Law*, 21 A.B.A.J. 499 (1935). Mention should be made, however, of J. Hall, General Principles of Criminal Law (1947), a major attempt at synthesis upon a number of important points. See Wechsler, Book Review, 49 Col. L. Rev. 425 (1949).

caliber of academic work in penal law are far below those in the fields that yield the large professional rewards. Only in recent years and in recognition of a public duty have the schools and the profession evinced interest and concern commensurate with the importance of the field.

This new interest has yielded tangible results, but thus far they lie mainly in procedure and administration. The Crime Surveys [5] and Wickersham Reports [6] focused attention on procedural abuses and the many problems that inhere in penal law enforcement. The Crime Conferences [7] aided the expansion of federal [8] participation in the work of crime control, including the intense development of the Bureau of Investigation. The Model Code of Criminal Procedure laid a basis for articulation and revision of the law of criminal procedure, culminating in the Federal Rules.[9] There have been advances generally in police organization, equipment, personnel and methods. Led by the Supreme Court, the courts have brought new vigor to the Bill of Rights and to the vindication of its fundamental safeguards in the realm of criminal procedure. And spurred far more by influences from without than from within the law, there has been major progress in methods of dealing with offenders on conviction: probation and other approaches to individualization of treatment, prison reform, correctional programs, improved release procedures, juvenile court development, the youth offender laws, the tremendous growth of social services that have a role in crime prevention. But important as this many-sided growth has been, it has been most unevenly distributed through the country; and where it has involved the penal law itself, as distinguished from procedure or enforcement, the change has been superimposed upon the corpus of the law without attention to the rest of the existing legal structure.

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[5] See, *e.g.*, CRIMINAL JUSTICE IN CLEVELAND (Pound and Frankfurter ed. 1922); Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. CRIM. L. & CRIMINOLOGY 427, 442 (1951).

[6] UNITED STATES: NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT (1931).

[7] See PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME (1934); PROCEEDINGS OF THE GOVERNOR'S CONFERENCE ON CRIME, THE CRIMINAL AND SOCIETY (N.Y. 1935); PETERSON, CRIME COMMISSIONS IN THE UNITED STATES 8–9 (1945).

[8] See Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64 (1948).

[9] See Freed, *The Rules of Criminal Procedure: An Appraisal Based on a Year's Experience*, 33 A.B.A.J. 1010 (1947).

B. Substantive Defects

Thus penal law today almost as much as twenty years ago shows the neglect with which it has been treated for so long. In many states the statutes have done little more with major crimes than indicate the range of penalties with which they may be visited, relying on the common law to pour content into the main concepts used. Most states, for example, still have no statutory definition of the crime of murder but only, where the crime has been divided into two degrees, of the indicia of first degree.[10] Many of the most important doctrines, such as those that give the measure of responsibility, complicity, excuse or justification, often have little or no reflection in the statutes,[11] having status as assumed qualifications of each individual enactment or as an explication of undefined words in statutory formulations, like "unlawful," "culpable" or "willful."[12] Even in states such as New York and California,[13] which have attempted a full legislative restatement of penal law, the statutes draw a large part of their meaning from the older concepts of the common law, and the gloss provided by decisions is extremely large. These are the formal indications of neglect and inattention.

The substantive indications are as plainly marked. There are important differences among the states as to the conduct that is criminal even in fields that involve serious behavior problems, *e.g.*, justification and excuse in homicide and other crimes involving bodily injury; the extent to which reckless or negligent injury or creation of the risk of injury is criminal; the range of sexual offenses; the scope of criminality in cases of conversion and of fraud; the defensive efficacy of honest mistake, such as belief in the validity of a divorce when a remarriage is attacked as biga-

[10] See MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 1264 *et seq.* (1940); PA. STAT. ANN. tit. 18, § 4701 (1945).

[11] For example, justification has been dealt with generally by statute in 4 states; justification and excuse in homicide in 27; mistake of fact in 11; mistake of law in 5; insanity in 23; duress in 17. Often, moreover, though there is a statute, it hardly states the governing criteria, *e.g.*, "A person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity . . . ." COLO. STAT. ANN. c. 48, § 3 (1935); GA. CODE ANN. § 26-301 (1936); ILL. STAT. ANN. c. 38, § 590 (1935); or "lunatics and insane persons" not responsible. CAL. PEN. CODE § 26 (1949).

[12] See Jackson, J., in Morissette v. United States, 342 U.S. 246, 251 (1952); People v. Weiss, 276 N.Y. 384, 12 N.E.2d 514 (1938); United States v. Murdock, 290 U.S. 389 (1933); Screws v. United States, 325 U.S. 91 (1945).

[13] N.Y. PEN. LAW §§ 1 *et seq.*; N.Y. CORRECTION LAW §§ 1 *et seq.*; CAL. PEN. CODE §§ 1 *et seq.* (1949).

mous; the reach and limitations of attempts, conspiracy and similar inchoate crimes; the adoption of new commitment procedures, as with respect to narcotic addicts and so-called "psychopaths"; and the criteria for judging the effect of mental disorder or defect on responsibility. No less important, there is even wider variation in the lines dividing minor crime from major criminality, the nature and number of the legal categories used to cover the more serious offenses, the extent to which the categories overlap, the differentiations drawn to vary applicable penalties or modes of treatment, the distribution of authority to make decisive judgments as to the offender's treatment and the penalties or treatment methods used.

These differences would present an important challenge to the agencies of law improvement even if they were the product of deliberate choice in different jurisdictions of the nation: the differences would call for exploration of the bases of competing views and some attempt to aid the rationality of judgment on the issues. They put an even larger challenge since we know in what large part their grounds are accidental or fortuitous — an old decision deemed to be authoritative, the mood that dominated a tribunal or a legislature at strategic moments in the past, a flurry of public excitement on some single matter, the imitative aspects of so much of our penal legislation, the absence of effective legislative reconsiderations of the problems posed. In this century only one state, Louisiana, has succeeded in accomplishing substantial legislative re-examination of its penal law resulting in enactment of a code effecting major changes.[14] Even there, although the work was done by the Louisiana Law Institute, its immediate practical objectives forced a limited conception of the possibilities, precluding the opening of many of the deepest issues posed.

C. Domination by Administration.

There are, of course, important differences between the law in action and the law in books in this as in other fields. The soundest paper system would be totally impoverished by an inadequate administration, and sensible administration may get good results

[14] LA. CODE CRIM. LAW & PROC. ANN. (1943); see Morrow, *The Louisiana Criminal Code of 1942 — Opportunities Lost and Challenges Yet Unanswered*, 17 TULANE L. REV. 1 (1942); Bennett, *The Louisiana Criminal Code*, 5 LA. L. REV. 6 (1942). A major revision in Wisconsin is, however, pending in the legislature. VII WISCONSIN LEGISLATIVE COUNCIL, REPORT (1950).

despite glaring defects in law. Abusive definitions of the scope of criminality may have their teeth drawn by the agencies of prosecution in refusing to proceed. Harsh or anarchical penalty provisions can be circumvented by proceeding for a lesser crime or by acceptance of a lesser plea. This happens on a large though incalculable scale.[15] But such correctives can only effect amelioration; they cannot extend the reach or vigor of the law beyond the fair intendment of its terms. There is, moreover, no assurance that the possible correctives will be used in situations where upon the merits they ought to be or that their application will be principled and free from favor or abuse. A society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves. Whatever one would hold as to the need for discretion of this order in a proper system or the wisdom of attempting regulation of its exercise, it is quite clear that its existence cannot be accepted as a substitute for a sufficient law. Indeed, one of the major consequences of the state of penal law today is that administration has so largely come to dominate the field without effective guidance from the law. This is to say that to a large extent we have, in this important sense, abandoned law — and this within an area where our fundamental teaching calls most strongly for its vigorous supremacy.

D. Psychological and Scientific Criticism

The importance and neglect of penal law and the wide breach between law and administration would make a case for reexamination of the subject, were there nothing else involved. Much more, however, is involved. For in no other area of law have legal purposes and methods been subjected to a more sustained and fundamental criticism emanating from without the legal group — especially the psychological and social sciences[16] — but buttressed also from within.[17]

[15] See, *e.g.*, CITIZENS' COMMITTEE ON THE CONTROL OF CRIME, TWELVE MONTHS OF CRIME IN NEW YORK CITY (1938); CRIME IN NEW YORK CITY IN 1939 (1939).

[16] See, *e.g.*, WHITE, INSANITY AND THE CRIMINAL LAW (1923); ALEXANDER AND STAUB, THE CRIMINAL, THE JUDGE AND THE PUBLIC (1931); ZILBOORG, MIND, MEDICINE AND MAN 246 *et seq.* (1943); BARNES AND TEETERS, NEW HORIZONS IN CRIMINOLOGY 14, 947 (1950).

[17] See, *e.g.*, GLUECK, CRIME AND JUSTICE (1936); GLUECK, CRIME AND CORRECTION (1952); WAITE, THE PREVENTION OF REPEATED CRIME (1943); Dession, *Psy-*

The challenge is, in substance, that the penal law is ineffective, inhumane and thoroughly unscientific. Its ineffectiveness is argued from the prevalence of serious offenses and the high rates of recidivism that the crime statistics uniformly show. Its inhumanity is argued from the use of punishment as the sanction, including even the penalty of death; the narrow range in which the law accords importance to the causes and dynamics of criminal conduct rather than the nature of the proved offense; the extent to which sanctions are governed by the injury inflicted rather than the future danger the defendant may present and the requirements for an effective therapy; the wide and seemingly anarchical disparity in sentencing practice even among judges of one court. All this is sometimes urged as evidence that penal law, whatever its exponents may avow as its philosophy and purposes, is actually animated largely by retributive objectives, constituting nothing more than vengeance in disguise.

The further impeachment based on science rests in part on these contentions but in larger part on the submission that the law — or at least some of its important aspects — employs unsound psychological premises such as "freedom of will" or the belief that punishment deters; that it is drawn in terms of a psychology that is both superficial and outmoded, using concepts like "deliberation," "passion," "will," "insanity," "intent"; that even when it takes the evidence of psychiatric experts, as on the issue of responsibility, it poses questions that a scientist can neither regard as meaningful or relevant nor answer on his own scientific terms; and, finally, that though the law purports to be concerned with the control of specified behavior, it rejects or does not fully use the aid that modern science can afford.

To state this many-sided challenge is not to say that it is right either in whole or in part or even that it is internally consistent. It is to say that its existence indicates a state of conflict about penal law among important groups seeking to further public interest that is itself a proper cause for deep concern. The way to profit from this tension and contribute to its mitigation is to explore the merits of such criticism in the context of a reconsideration of the law. Where the critique is valid, law will gain from recognition of its merit. Where it reflects misunderstanding

chiatry and the Conditioning of Criminal Justice, 47 YALE L.J. 319 (1938); Lukas, *A Criminologist Looks At Criminal Guilt* in 2 SOCIAL MEANING OF LEGAL CONCEPTS 113 (1950); Weihofen, *The Metaphysical Jargon of the Criminal Law*, 22 A.B.A.J. 267 (1936).

or inadequate analysis of the intrinsic social problems, a reasoned statement of the points involved may serve to clear the air.

It should be added that in recent years the law has yielded major ground before the thrust of some of these contentions; this is, indeed, where the reform has been. There is no difference of opinion, for example, on the point that prisons can be totally destructive in their influence upon impressionable inmates, enlarging rather than diminishing potentialities for further criminality by the time the moment of release arrives. This is the basis of probation laws, affording power to forego imprisonment, as well as prison reform and new release procedures, designed to mitigate or eliminate destructive factors, and to enlarge constructive influences, insofar as that can feasibly be done.

There has been some acceptance also of the larger point that penal law in general ought to concern itself with the offender's personality, viewing his crime primarily as a symptom of a deviation that may yield to diagnosis and to therapy. This is the theory of the juvenile court and youth offender laws, which seek public protection mainly through a disposition calculated to effect reform of antisocial tendencies, with the offender being deprived of liberty only when and insofar as that is deemed essential pending the rehabilitation sought. It is the theory used in dealing with the irresponsible and in related areas in which commitments have been authorized. It is an approach that is now possible to a significant extent in treatment of adult offenders, by virtue of probation laws and the development of indeterminate sentences, though neither law nor its administration can be said to concentrate upon this single end.

Whether and to what extent the law ought to go further and embrace this as its only or its major object is one of the basic issues calling for consideration. The implication of this proposition with regard to treatment methods and its further impact on the definition of offenses, not to speak of the problem of safeguards for the individual, call for much larger exploration than they thus far have received. Even the reforms of recent years that move in this direction and the experience that they have yielded call for close evaluation on the most impartial scale.

II. Scope of Re-examination

Any comprehensive study of the penal law involves three main inquiries: (1) What behavior ought to be made criminal and

how should it be defined? (2) What variations in the nature, circumstances or results of criminal behavior or in the character or situation of the individual offender should have the legal consequences of varying the mode of treatment of offenders? (3) What methods of treatment ought to be prescribed or authorized in dealing with offenders; what scope of discretion as to method should be vested in administration; and in what agency or agencies should such discretion be reposed?

Every provision of the penal law is necessarily addressed to one or more of these issues. The need for fresh appraisal and constructive thought obtains in all three fields.

A. The Definition of Criminal Behavior

(1) *Objectives.* — If the right object of the penal law were simply to provide a punishment when an injury has been inflicted, the only question to be asked in marking out the bounds of criminality would be what constitutes sufficient injury and when, if ever, the infliction of such injury should be excused. While this view of the law of crime may still have some adherents, it has small reflection in existing law and less support in morals or in social theory. Civilized social thought regards the penal law as the ultimate weapon for diminishing the incidence of major injuries to individuals and institutions, with only such concessions to retaliatory passions as are practically necessary for the system to survive. In short, while invocation of a penal sanction necessarily depends on past behavior, the object is control of harmful conduct in the future. The legislative question therefore is: What past behavior has such rational relationship to the control of future conduct that it ought to be declared a crime?

The formal principles of any answer may be readily articulated: (1) conduct that is so harmful that the social force should make an effort to deter it by its condemnation under threat of penal sanctions; and (2) conduct that shows the individual sufficiently more likely than the rest of men to be a menace in the future to justify official intervention to measure and to meet the special danger he presents.

The challenge lies in making the social and psychological evaluations of behavior involved in legislative application of these principles upon a practicable scale.

(2) *Classification of Injuries.* — The first task of analysis is to appraise and classify the major injuries with the prevention of

which penal law should be concerned. While this is clear enough in some of the most vital instances, *e.g.*, death, bodily harm, serious psychical harm, it calls for close examination in other areas, *e.g.* coercion, invasion of property interests, sexual activity and the remoter threats to social institutions. What, for example, is the principle of demarcation between those coercions that should be accepted as intrinsic to a free, competitive society and those that constitute abuse of power of the kind with which the penal law should be concerned? Much property destruction, fraud and breach of trust are now regarded as the bases for no more than civil remedies. Are the injuries involved significantly different in their nature, scope or compensability than those from which criminal law now affords protection? In another area, does Dr. Kinsey's data [18] and other modern insight with respect to sexual activity have a bearing on what may significantly be regarded as an injury which should be classified as criminal? Has the extension of divorce altered the injuries to marital relations which call for preventative effort from the law of crime? Clarity on such points as these is necessary to delineate the right concerns of penal law; it also is essential to arrange and marshal individual provisions fashioned systematically to advance preventive aims.

From the preventive point of view, the harmfulness of conduct rests upon its tendency to cause the injuries to be prevented far more than on its actual results; results, indeed, have meaning only insofar as they may indicate or dramatize the tendencies involved. Reckless driving is no more than reckless driving if there is a casualty and no less if by good fortune nothing should occur. Actual consequences may, of course, arouse resentments that have bearing on the proper sanction. But if the criminality of conduct is to turn on the result, it rests upon fortuitous considerations unrelated to the major purpose to be served by declaration that behavior is a crime.

This point is reflected broadly in existing law when criminality involves intentional misconduct; if the act is of the kind that tends to cause the injury forbidden it will normally be criminal as an assault or an attempt if it has failed of its object in the concrete case. Moreover, many substantive offenses, such as burglary, blackmail, perjury and forgery, for example, are defined without regard to whether the ultimate evil sought to be avoided

[18] KINSEY, POMEROY AND MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

has occurred. So too, much conduct is made criminal because it tends to promote or facilitate the criminality of other persons — as in receiving stolen goods, incitement and some of the forms of accessorial responsibility.[19] There are many situations, nonetheless, especially involving recklessness or negligence, where the criminality of highly dangerous behavior turns on whether it has actually caused the untoward consequence that it portends. A major issue to be faced, therefore, is whether penal law ought to be shaped to deal more comprehensively with risk creation, without reference to actual results.

(3) *Justification.* — The fact that conduct has substantial harmful tendencies does not itself establish that it ought to be regarded as an object of prevention. The tendency to injure may be outweighed by other beneficial tendencies that justify whatever risk may be involved; and risk itself is a matter of degree. No one would argue that a homicidal act in necessary self-defense should be a crime. Automobiles hardly ought to be outlawed, though their use portends the largest loss of life of all peaceful activities; we must be satisfied to strike at the creation of substantial risks unnecessary to the use of the machine. One of the reasons why the actor's purpose is so often made an element of criminality is that it provides a mediating principle for solving problems of this kind.

This inevitable balancing of gains and losses in potentialities of conduct poses problems of great difficulty even in the most familiar areas. Should police be authorized to shoot to make arrests, and if so, in what circumstances? What force ought to be privileged to prevent the commission of a crime, protect or retake the possession of property, correct a child, control a prisoner, deal with intruders? When is it justifiable to burn one's own property? What justifying factors should negate a charge of negligence based on creation of substantial risk of death or injury?

Among the main considerations to be balanced is, of course, the consequence of any legal condemnation. Will it so burden necessary or legitimate activity that it must either be ignored in action or have the undesirable effect of discouraging desirable conduct, rather than its abuse alone? How strict a rule, for example, can be laid down on self-defense and still have any influence

[19] *Cf.* HOLMES, THE COMMON LAW 70 *et seq.* (1881); Note, *A Rationale of the Law of Burglary*, 51 COL. L. REV. 1009, 1020–24 (1951); J. HALL, THEFT, LAW AND SOCIETY 125–228 (1935).

upon behavior or exert a desirable influence, insofar as it can have effect at all? When will restrictions on police produce a general decline in their initiative and efficiency rather than merely limit the improper use of violence? Would criminal liability for promissory frauds discourage ordinary contracts, as is often claimed in explanation of their usual exclusion from the reach of penal law,[20] though they have long been ground for federal prosecution when the mails are used? [21]

Such issues are involved throughout in marking out the bounds of criminality but frequently receive inadequate attention at the legislative stage. Indeed, one of the stable ambiguities in penal legislation is whether an enactment should be read judicially as it is written or with unstated qualifications to allow for justifying factors that the statute on its face ignores. What is required is broad exploration of the substance of these problems and a systematic method of solution either in the definition of particular offenses or in general provisions formulating proper justifying norms.

(*4*) *Culpability.* — The significance of conduct for preventive purposes cannot be made to rest upon its tendencies alone. Unless the actor is or ought to be aware of those aspects of his behavior or of the environment that give his conduct an offensive quality, the threat of sanctions cannot operate as a deterrent and the conduct does not show the individual to be a larger menace than another man. Criminal liability ought not, therefore, to depend merely upon external factors; it should also take account of the actor's state of mind. But when one asks what states of mind should be important for this purpose, there is room and need for legislative choice.

When the evil threatened is large, it may be argued that it ought to be sufficient that the actor could and should have known the facts that give his conduct its offensive tendency; [22] the sanction would, in that event, be used to create strong incentive to find out these facts before acting. Whether or to what extent so strict a ground of liability should be employed presents a number

[20] See, *e.g.*, Chapin v. United States, 157 F.2d 697, 699 (D.C. Cir. 1946).

[21] See 18 U.S.C. § 1341 (Supp. 1951); United States v. Rowe, 56 F.2d 747 (2d Cir. 1932); Knickerbocker Merchandising Co. v. United States, 13 F.2d 544 (2d Cir. 1926).

[22] See, *e.g.*, Holmes, J., in Commonwealth v. Pierce, 138 Mass. 165 (1884).

of important psychological and moral problems.[23] When such insistence on a duty of awareness is conceived to be too onerous or fruitless, criminality may be confined to cases where actual knowledge of evil potentiality is proved. In some situations even knowledge may not be regarded as sufficient, absent a true purpose to inflict the injury the law endeavors to prevent.

Existing law goes even further in some areas, prescribing liability without regard to any mental factor, the theory being that the object of control would be defeated if proof of purpose, knowledge, or even negligence were required for conviction.[24] The most that can be said for such provisions is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved. In such a case, if not always, absolute penal liability is an abuse. Yet it obtains in some states in such areas as bigamy, statutory rape, homicide (where a third party mistakes the original aggressor for the victim and kills in his defense) and in other important fields.[25]

No less important, it is difficult to trace a stable principle in the determinations of prevailing law as to when criminality is made to rest on negligence and when on knowledge and purpose. The area where negligence suffices would appear upon the surface to be limited to homicide and conduct that inflicts bodily injury. But doctrines governing mistake of fact as a defense may extend this principle broadly insofar as they require that mistake be reasonable if it is to exculpate. To some extent, moreover, risk creation due to negligence is reached by special legislation, such as that dealing with reckless driving. Some injuries to be sure, such as forcible rape, hardly can be caused or threatened negligently, though even here intoxication or narcotics might exclude a true volition. Arson, however, involves conduct that is no less

[23] See Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COL. L. REV. 701, 746–51, 1261, 1274–76 (1937); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 215–39 (1947).

[24] See Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933); J. HALL, *op. cit. supra* note 23, at 279–322; Morissette v. United States, 342 U.S. 246, 251 (1952).

[25] See Sayre, *supra* note 24, at 73–75, 80–83; Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. OF PA. L. REV. 35, 58–62 (1939); *cf.* L. Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U. OF CHI. L. REV. 641 (1941).

damaging or threatening when it is negligent than when it is intentional but an essential element of the offense is a purpose to burn. And in the broad area of accessorial liability, where criminal complicity rests on agreement that another should commit a crime or on assisting him to do so, a true purpose to advance this end is usually necessary,[26] though much behavior short of this contributes to the incidence of crime.

The verbal explanations on these points are often clouded in a fog of question-begging formulae about intent, both "general" and "special." The issues call for fresh appraisal in each major area of criminality, in terms of psychological realities and of the purposes that penal law should serve.

(5) *Dangerous Persons.* — There is, of course, a close relationship between the question whether conduct is so harmful that an effort to deter it is demanded and the question whether it identifies the actor as a person likely to have dangerous potentialities. Murder, arson, forcible rape and robbery, to give but four examples, involve behavior that would call for sanctions under either standard. But there is also much behavior that reveals the actor as a danger though the conduct in itself might not be worth an effort at deterrence.

One important area of conduct of this sort involves acts constituting preparation for some further criminality. Prevailing law now reaches it in part through the medium of attempts (though the line is drawn close to the completion of the crime); conspiracy (which reaches further back into the area of preparation) and a large number of specific crimes, such as burglary or the possession of burglar's tools with an unlawful purpose, where the definition of the offense includes an intent to commit another crime. It is often, if not usually, idle to suppose that threats addressed to the preparatory action can significantly add to the deterrent efficiency of the sanction — which the actor, by hypothesis, is planning to ignore — threatened for the crime that is the object of the preparation. But when both preparation and firm criminal purpose can be proved, there is a basis and a need for legal intervention — to meet the special danger that the individual presents and to frustrate, if possible, commission of the crime that he intends. The formulation of offenses of this order presents a substantial difficulty, however,

[26] See, *e.g.*, L. Hand, J., in United States v. Peoni, 100 F.2d 401 (2d Cir. 1938); Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

because of the pervasive danger that equivocal behavior may be misinterpreted as preparation to commit a crime.

Any survey of the content of a modern penal code will show large areas of legislation — some highly questionable — resting mainly upon justification of this kind. Appraisal of its merit and its proper scope will be of much importance, not the least because its underlying theory is so frequently ignored. By the same token, the law of attempts and of conspiracy will benefit from re-examination in these terms. Conspiracy especially is often criticized as verging on guilt by association.[27] Is this depreciation merited, and if it is, what new protective elements ought to be introduced into the definition of the crime?

The behavior of the irresponsible presents a second and a very difficult area where it seems futile to expect the threat of sanctions to exert restraining influence. The individuals involved are by hypothesis bereft of cognitive capacity to grasp the application of the threatened penalty to their behavior or of volitional capacity essential to control. This is the underlying rationale of the much-disputed legal tests drawn from *M'Naghten's Case*[28] and supplemented in some states by allowance for so-called "irresistible impulse."[29] But these criteria — however relevant upon the issue of the proper treatment of the individual — have no bearing on the need for protective social action in the situation. The very facts that lead to the conclusion that the individual is non-deterrable show also that he probably presents a public danger calling for control. There must, therefore, be legal basis for commitment in such cases and provisions for this purpose are, of course, the rule.

Such commitments are in legal theory "civil"; irresponsibility within the legal tests precludes a criminal conviction. This concept calls for re-examination in light of its effects on treatment and release procedures, with recognition that these dispositions are a necessary element in the protective scheme of penal law. There is need as well for exploration of the practical relationship between

[27] See, *e.g.*, O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 599–602 (1948); Note, *Guilt by Association — Three Words in Search of a Meaning*, 17 U. OF CHI. L. REV. 148, 152–54 (1949); Jackson, J., concurring in Krulewitch v. United States, 336 U.S. 440, 445 (1949). *But cf.* Jackson, J., concurring in Dennis v. United States, 341 U.S. 494, 572–77 (1951).

[28] 10 C. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). The tests enunciated in this case are, in substance, those now employed by most state courts, sometimes under compulsion of a statute, *e.g.*, N.Y. PEN. LAW § 1120.

[29] See, *e.g.*, Parsons v. State, 81 Ala. 577, 2 So. 854 (1887).

commitments of the irresponsible, where there has been an act that otherwise would be a crime, and the compulsory commitment mechanisms resting solely on a diagnosis of psychosis.[30] Can such diagnostic methods be extended safely into other fields, dispensing with the need for articulation of a clear, behavior basis for the use of sanctions? The experience with "sexual psychopathy" enactments should be examined in this context, in light of the best psychiatric judgments in the field. Far from concluding that the legal system is too unresistant to new psychiatric insight, it may be found that in this case it has too readily succumbed to claims that the best scientific thought would disavow.[31]

If the "civil" label serves a useful function in dealing with the irresponsible, it is important to inquire how far it is useful in such other areas as alcoholism,[32] narcotic addiction,[33] prostitution [34] and deviant sexual activity, where threatened condemnation offers minimal potentialities for effective control but therapy is necessary and may be effective.

(6) *Drafting Problems.* — Given substantive insight with respect to the behavior that a model code should treat as criminal, how broadly or how narrowly should individual offenses be defined? The piecemeal, *ad hoc* growth of our penal law has made for great proliferation of offenses with the line of demarcation often far too subtle for effective administration. The problem is well illustrated by the property offenses where theft by trespass, conversion and fraud is still often, if not usually, subdivided into separate crimes, with even further subdivisions in conversion and in fraud.[35] Such unduly close distinctions — unrelated to the

[30] See Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307 (1946); Note, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178 (1947).

[31] See, *e.g.*, GUTTMACHER, SEX OFFENSES 120 *et seq.* (1951); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 9, PSYCHIATRICALLY DEVIATED SEX OFFENDERS (1950); REPORT OF THE NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER (1950); REPORT OF THE GOVERNOR'S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER (Mich. 1951); PLOSCOWE, SEX AND THE LAW 216 *et seq.* (1951).

[32] See Note, *Legislation for the Treatment of Alcoholics*, 2 STAN. L. REV. 515 (1950).

[33] See, *e.g.*, MASS. ANN. LAWS c. 123, § 113 (1949).

[34] See, *e.g.*, MARSH, PROSTITUTES IN NEW YORK CITY: THEIR APPREHENSION, TRIAL AND TREATMENT (1941).

[35] For instances of statutory consolidation, see N.Y. PEN. LAW §§ 1290, 1290-a; MASS. ANN. LAWS c. 266, § 30 (Supp. 1950); CAL. PEN. CODE § 484 (1949); LA. CODE CRIM. LAW AND PROC. ANN. art. 740–67 (1943); *cf.* Stumberg, *Criminal Ap-*

criminality of conduct — serve no useful purpose, but can lead to merely technical acquittals that represent a legal failure and breed disrespect for law. Proper drafting can accomplish much consolidation, without jeopardizing a defendant's notice of the basis of the charge. There is room for much improvement on this point through re-examination of technique.

A related drafting problem poses larger difficulty. What specificity is necessary in the definition of offenses or the delineation of justifications or excuses? Basic concepts of fairness — embodied to a large extent in constitutional provisions — demand a clarity from penal law that is not readily attainable in view of the conflicting factors to be weighed and the inherent limits of articulation.[36] What, for example, is a legislative prohibition of negligent or reckless homicide beyond a license to the court and jury to evaluate behavior causing death in terms of the risks of injury it presents and any factors making for justification or excuse? The use of such broad standards is to some extent essential, notwithstanding recognition of the value that inheres in specificity, both as a guide to conduct and as a protection against arbitrary or discriminatory judgments after the event. It must, in short, be recognized that any penal code must draw a portion of its content from adjudication and administration. Where that is so, the legislative problem is to chart the contours of permissive application and confine the judgments to be made in proper bounds. Here too advances may be possible through re-examination of technique. There is, moreover, in the prevailing norms much unnecessary ambiguity that systematic study and reformulation should substantially reduce.

B. Variations in Treatment

The multiplicity of definitions of offenses or degrees thereof embodied in the penal law transcends by far what is required or appropriate in marking out the bounds of criminality. Their function is to vary the required or permitted treatment of offenders in accordance with the nature, circumstances or results of their criminal behavior.

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propriation of Movables — A Need for Legislative Reform, 19 TEXAS L. REV. 117, 300 (1941).

[36] See Frankfurter, J., dissenting in Winters v. New York, 333 U.S. 507, 520, 532–39 (1948); *cf.* Johnson, J., in Martin v. Hunter's Lessee, 1 Wheat. 304, 374 (U.S. 1816): "Language is essentially defective in precision; more so than those are aware of who are not in the habit of subjecting it to philological analysis."

Many distinctions of this order have quite trivial significance, as when a maximum, nonmandatory sentence of imprisonment is increased from five to six or from fourteen to fifteen years. One may ask why such narrow lines should be drawn legislatively and how they possibly can have a rational foundation. Many provisions, too, have come to be so nullified in practice or so qualified in their importance by general enactments granting a discretion as to sentence,[37] that they exert small influence upon the dispositions that are made. There is, therefore, much room for elimination of discriminations that have ceased to serve meaningful purposes in modern law. A great deal more than this, however, is involved. The point of a distinction may be that it distinguishes a capital from a noncapital offense, determines a mandatory sentence of imprisonment, differentiates long and short maxima, excludes probation or draws the line between a minor dereliction and a major crime. Such issues often have larger importance than the question whether the defendant's conduct constitutes a crime at all. The criteria by which they are determined call for thorough canvassing and reconsideration.

Any discriminations made for the purpose of varying the treatment of offenders should reflect, at the least, important differences in harmfulness of conduct and the consequent importance of deterring it, in the probable dangerousness of the individual whose conduct is involved or in public demand for sanctions so inexorable that it should not be denied. What differentiations with respect to criminal behavior, as distinguished from the history and personality of the offender, have significance in this perspective? How many such distinctions should be given weight in legislation and what sort of bearing should they have?

(*1*) *Variations Based on Results.* — A large difference in applicable sanctions usually (though not always) turns on the results of criminal behavior. The starkest illustration is the case of homicide, which may be capital in all but five states.[38] The

[37] *E.g.*, CAL. PEN. CODE § 1168 (1949); N.Y. PEN. LAW §§ 1945, 2188; W. VA. CODE ANN. § 6128 (1949); see Beattie and Tolman, *State Sentencing Practices and Penal Systems* in REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME 81 (1942).

[38] ME. REV. STAT. c. 117, § 1 (1944); MICH. COMP. LAWS § 750.316 (1948); MINN. STAT. ANN. § 619.07 (West 1947); S.D. CODE § 13.2012 (1939); WIS. STAT. § 340.02 (1949). In North Dakota and Rhode Island the death penalty is imposed only after a conviction of murder committed while the defendant was under sentence for a former conviction of murder in the first degree. N.D. REV. CODE § 12-2713 (1943), R.I. GEN. LAWS c. 606, § 2 (1938).

line dividing this supreme offense from other crimes, whether attempt, assault or something else, is that a death was "proximately caused" by the defendant's conduct. Accordingly, when murder is involved, the life of the offender may depend on whether his victim recovers or dies and, if the latter, on whether or not the concept of causality employed sees a sufficient nexus between the fatality and the act charged.[39] In manslaugher, conviction of a major rather than a minor crime may turn on these considerations. So too in assaults, the fact that there was injury often has influence upon the range of sanctions. In other situations, the "result" that may have much effect upon the authorized treatment of the defendant may involve even narrower distinctions: in rape that there was "penetration"; [40] in arson that some portion of the structure (however small) was consumed by fire; [41] in theft the value or amount of property taken, obtained or misappropriated; [42] in kidnaping, which may be capital, that there was seizure of the victim (though how much more actual or intended restraint this involves than any false imprisonment is vague).[43]

To what extent are these delineations related to the purpose to be served by sanctions or even to the type of punitive response that public opinion may demand? Insofar as there may be a basis for distinguishing between completed and inchoate crimes, where should the lines be drawn and how large a disparity in applicable modes of treatment ought to be allowed? Should conspiracy be treated as a misdemeanor even when its purpose is a serious offense, as many statutes now provide?

(2) *Nature and Circumstances of Behavior.* — Discriminations resting on the nature or the circumstances of criminal behavior may present no less a challenge. What standards, for example, should determine when homicide is subject to the highest punishment? In some ten states,[44] as in England, it suffices that

[39] See Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COL. L. REV. 1261, 1294–98 (1937).

[40] *E.g.*, N.Y. PEN. LAW § 2011 (any penetration is sufficient to complete the crime).

[41] See Note, 1 A.L.R. 1163 (1919).

[42] *E.g.*, ILL. ANN. STAT. c. 38, § 389 (Supp. 1951) (property taken over $50, 10 years; property taken under $50, 1 year).

[43] See, *e.g.*, People v. Hope, 257 N.Y. 147, 177 N.E. 402 (1931); Cox v. State, 203 Ind. 544, 177 N.E. 898 (1931); People v. Knowles, 35 Cal.2d 175, 217 P.2d 1 (1950); Note, 38 CALIF. L. REV. 920 (1950).

[44] GA. CODE ANN. §§ 26–1001 *et seq.* (1935); ILL. ANN. STAT. c. 38, §§ 337 *et seq.* (1935); KY. REV. STAT. § 435.010 (1948); LA. CODE CRIM. LAW & PROC. ANN. art.

the defendant intended to kill or to injure seriously, unless acting in the "heat of passion" upon "adequate" provocation (limited substantially to blows by the deceased); or that he was engaged in the commission of a felony (even though death was accidental); or that he acted with great recklessness to life. Most states, however, have divided murder into two degrees, requiring for the first degree deliberate purpose to take life or, in the case of felony-murder, that the underlying crime was one of such designated felonies as arson, burglary, robbery or rape.[45] Moreover, there is usually a discretion in the jury to forego capital sentence in favor of imprisonment for life.[46] As always when an extreme sanction is in issue, these delineations raise impressive questions and present abiding difficulties. Have they a basis in sound principle and what alternatives might be employed? [47] What meaning ought to be accorded to "deliberation" and to "passion?" [48] Should the fact that the defendant was intoxicated or of weak intelligence or unstable emotions have weight on this issue? What distinction, if any, ought to be made among accomplices and on what ground? What evidence should be admissible to aid the jury in the exercise of its discretion and what instructions, if any, should it receive? [49]

Similar questions may be posed with equal point in many other fields. In New York, as in most states, it is a felony to "break" and enter any building with intention to commit a crime, a misdemeanor if there merely was an entry for such purpose.[50] But "breaking" may mean nothing more than opening an outer

740–30 (1943); ME. REV. STAT. c. 117, §§ 1–4 (1945); MISS. CODE ANN. tit. 11, c. 1, § 2215 (1942); OKLA. STAT. tit. 21, § 701 (1951); S.C. CODE c. 68, § 1101 (1942); S.D. COMP. LAWS § 13.2007 (1939); TEX. PEN. CODE ANN. art. 1256 (1948).

[45] *E.g.*, PA. STAT. ANN. tit. 18, § 4701 (1945). Pennsylvania was the first state to adopt this distinction. Pa. Laws 1794, c. 257, §§ 1, 2. See Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COL. L. REV. 701, 1261 (1937).

[46] See Frankfurter, J., concurring in Andres v. United States, 333 U.S. 740, 752–70 (1948).

[47] In England a Royal Commission has been working on these problems since August, 1949. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE (1949–1950).

[48] See, *e.g.*, Commonwealth v. Jones, 355 Pa. 522, 50 A.2d 317 (1947); People v. Caruso, 246 N.Y. 437, 159 N.E. 390 (1927); State v. Cordasco, 2 N.J. 189, 66 A.2d 27 (1949); Fisher v. United States, 328 U.S. 463 (1945); *cf.* CARDOZO, LAW AND LITERATURE 99 (1931).

[49] See, *e.g.*, Commonwealth v. DePofi, 362 Pa. 229, 66 A.2d 649 (1949); Commonwealth v. Wooding, 355 Pa. 555, 50 A.2d 328 (1947); State v. Martin, 92 N.J.L. 436, 106 Atl. 385 (1919).

[50] N.Y. PEN. LAW §§ 402–05.

door.[51] Can so substantial a distinction in the gravity of the offense properly rest upon such ground? Some states, on the other hand, like California, have now eliminated the requirement of breaking, treating any entry with intention to commit a felony or petty larceny as burglary.[52] Thus a shoplifter commits a serious offense merely by entering a store intending to commit a petty theft. Does entry yield a basis for a differentiation of this kind? [53] In some jurisdictions larceny by false pretenses carries lighter sanctions than the other forms of theft; [54] in others the situation is reversed.[55] Can such differences in nonviolent modes of acquisition have important bearing on the nature of the disposition to be made? Even where distinctions rest upon evident logic, as where conduct that involves a threat to life or limb is viewed more seriously than threats limited to property, there are important problems to be faced. How should the lines be drawn, for example, between robbery, extortion and theft? [56] What significance should be accorded to possession of a weapon, and what weapons are important for the purpose? Will it provide larger protection to the victim of a kidnaping if the severest penalty is barred when the victim is released alive or only when he is released unharmed and, if the latter, what degree of injury should be regarded as establishing that he was harmed? [57]

It should be added that it is no less important to inquire whether law has failed to draw distinctions that in justice should be drawn. In some states, for example, the single category rape includes both violent sexual assault and intercourse with a consenting female under the prescribed age of consent (usually sixteen or eighteen

[51] *Id.* § 400.

[52] CAL. PEN. CODE § 459 (1949).

[53] See Note, *A Rationale of the Law of Burglary*, 51 COL. L. REV. 1009 (1951); Note, *Statutory Burglary — The Magic of Four Walls and A Roof*, 100 U. OF PA. L. REV. 411 (1951).

[54] *E.g.*, N.J., STAT. ANN. §§ 2:134–1 (false pretenses is a misdemeanor with 3 years maximum sentence and $1,000 fine), 145–2 (grand larceny is a "high misdemeanor" leading to a seven year maximum sentence and $2,000 fine) (1939); ORE. COMP. LAWS ANN. §§ 23–519, 523, 537 (1940) (maximum 10 years for grand larceny and embezzlement; false pretenses 5 years).

[55] *E.g.*, FLA. STAT. ANN. §§ 811.01, 812.04, 817.01 (1944) (larceny and embezzlement: maximum 5 years; false pretenses: maximum 10 years); IOWA CODE § 709.2 (grand larceny: maximum prison term 5 years and $1,000 fine), § 713.1 (false pretenses: maximum 7 years and $500 fine) (1950).

[56] See, *e.g.*, N.Y. PEN. LAW §§ 2120–29, 850–52.

[57] See Robinson v. United States, 324 U.S. 282 (1945).

years),[58] without discrimination in the applicable mode of disposition. And even where there is a differentiation in these terms, the latter conduct usually is a felony.[59] Only recently New York reduced the grade of the offense but only if the male is under twenty-one.[60] Much thought is needed to determine what distinctions in the realm of sexual behavior are appropriate to circumscribe the area in which it is defensible to treat the conduct as a serious offense or as an indication of a deviation fraught with dangerous potentialities calling for maximum control.[61] The problem is especially important at a time when popular emotion on the subject has been much aroused.

Moreover, it is curious that grounds for mitigation, such as provocation, that have long been given legal weight in homicide, have received little or no statutory consideration in fixing sanctions for other offenses — even those involving much identical behavior, like the serious assaults.

One of the tensest issues to be dealt with in the treatment field is that of the significance that law should give to mental disorder or defect of the offender. As matters stand, all states acknowledge that if the disorder or defect precluded knowledge of the nature of the act or of its wrongful quality, the defendant must be acquitted as irresponsible, subject, however, to commitment to a mental institution if and as long as he is in a dangerous condition. A minority of states attach the same significance to a disorder or defect resulting in "irresistible impulse" — even though cognitive capacities were not thus totally impaired. The weight carried by these legal tests is most acute in cases where the charge is murder and conviction may involve capital punishment, whereas acquittal involves therapy if it is necessary and release upon a cure.[62]

This position poses a congeries of major problems. Within the framework of the legal rules, what level and degree of understanding is implied by the criterion of knowledge and to what

[58] *E.g.*, IOWA CODE § 698.1 (1950); MASS. GEN. LAWS c. 265, §§ 22, 23 (1932).

[59] *E.g.*, CAL. PEN. CODE § 264 (1949).

[60] N.Y. PEN. LAW § 2010.

[61] *Compare* N.Y. Laws 1950, c. 525, *with* REPORT OF THE GOVERNOR'S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER 134 *et seq.* (Mich. 1951).

[62] On the underlying theory of the "criteria" of irresponsibility, see Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COL. L. REV. 701, 752–57 (1937). *Cf.* Glueck, *Psychiatry and the Criminal Law* in CRIME AND CORRECTION 138, 141 *et seq.* (1952); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 477 *et seq.* (1947).

extent is knowledge lacking in the case of well-defined psychotics? [63] If the object of the law is to exclude the nondeterrables from sanctions that have general deterrence for their object, is there need to supplement the knowledge test by asking whether the defendant has the power to control his conduct in the light of knowledge? [64] Is this the meaning of the question whether the behavior was the product of "irresistible impulse," in jurisdictions where this test obtains, and, if so, is that a valid formulation of the standard? Can these questions, in any case, be answered after the event with any real assurance and, if not, what better questions might be asked? Is there merit in the grievance that this legal terminology lacks meaning to a scientist [65] and that the law has failed to keep pace with advances in the psychiatric field? If so, how should the legal standard be reformulated? In view of the degrees of defect and disorder, should law recognize partial impairment of responsibility as a substantial mitigation, less significant than total irresponsibility but not to be ignored?

These imposing substantive issues are matched by problems of procedure that are equally acute. The "battle of experts" when responsibility is contested has long been an abuse, and though less common than in former years it still occurs. Should expert testimony be allowed when based upon hypothetical questions? How can disinterested experts best be provided? What limitations if any should be imposed on cross-examination? Can juries be expected to resolve conflicting testimony of psychiatrists?

The trend of solution of both the procedural and substantive dilemmas has been the development of pre-trial clinical examination upon order of the court.[66] This examination has, however, been directed usually to the present psychiatric condition of the

[63] See, *e.g.*, Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 552 (1939); WERTHAM, THE SHOW OF VIOLENCE 152 (1949); and *cf.* 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 163 (1883); ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 485, ¶ 6655 (1949).

[64] Compare the standard used in court martial proceedings, MANUAL FOR COURTS-MARTIAL § 78a (1928) ("and to adhere to the right").

[65] *Cf.* Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 550–52 (1939).

[66] See, *e.g.*, Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961 (1950); Overholser, *Psychiatric Expert Testimony in Criminal Cases Since McNaghten—A Review*, 42 J. CRIM. L. & CRIMINOLOGY 283 (1951); Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 COL. L. REV. 933 (1932).

defendant, the question being whether he is fit to stand his trial.[67] Progressively, the tendency has been to ask if the defendant is psychotic, and, upon concluding that he is, to recommend against capacity for trial. Since prosecutive acquiesence is the norm, the ordinary result of such recommendation is uncontested commitment without trial.

This system has its virtues, but it also raises questions of importance. Is it fair to the defendant to commit without disposing of the prosecution, implying that if he recovers he will be returned for trial, perhaps on a capital charge? The unadjudicated case may be a handicap to therapy, especially in cases on the borderline. There may also be some question as to whether all psychotics are unfit for trial, *i.e.*, incapable of understanding the charge and assisting in their own defense. Does this development involve evasion of the issue of responsibility, and if so, should not the problem of improving the criteria be faced, if they are wrong? There is continued need here for sustained, collaborative thought by lawyers and psychiatrists prepared to work through the whole controversial area in search of common ground.

(*3*) *Background and Situation of Offender.* — Discriminations in treatment based on the nature, circumstances or results of criminal behavior are paralleled by those that rest directly on the background or the situation of the offender. One such set of problems involves the young offender. It is now half a century since the establishment of juvenile courts to deal with delinquent and neglected or dependent children with the single object of accomplishing their rehabilitation.[68] Is the jurisdiction of these courts rightly defined? Should a distinction be perceived between the delinquent and the dependent child and, if so, with what legal implications? What ought to be the distribution of authority between the judge and other social agencies concerned? To what extent should law attempt to provide norms for disposition where the matter is now left to the discretion of the court? Would it be profitable at this stage and in the light of our rich experience to re-examine these enactments with an eye to their improvement, either in essential substance or in detail?

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[67] See, *e.g.*, N.Y. CODE CRIM. PROC. §§ 658–62d. *But cf.* MASS. ANN. LAWS c. 123, § 100A (1949).

[68] See LOU, JUVENILE COURTS IN THE UNITED STATES (1927); CONSULICH, JUVENILE COURT LAWS OF THE UNITED STATES (2d ed. 1939); S. & E. GLUECK, ONE THOUSAND JUVENILE DELINQUENTS 9–14 (1934); TAPPAN, JUVENILE DELINQUENCY 167 (1949); JUVENILE DELINQUENCY, ANNALS (January 1949).

Some of these issues are projected sharply at the moment as a consequence of the American Law Institute's preparation of the Model Youth Correction Authority Act,[69] concerned with rehabilitative treatment of young offenders above the age of jurisdiction of the juvenile court (*i.e.*, normally 16–21). This promulgation has stimulated youth authority enactments in five states and in the federal jurisdiction;[70] other states have enacted legislation authorizing special dispositions of some young offenders without the incorporation of the Youth Authority.[71] The state authority statutes, however, have involved large departures from the Model Act, the most startling of which is that they either have been limited to juveniles or have included them together with the older group for which the Model Act was framed.[72] These developments have led the Institute to plan a re-examination of the model. It may be necessary or at least desirable that this inquiry should comprehend some of the broader issues that pervade the juvenile court field. In any case, work on the model code will provide an important opportunity for a continued canvass of the present situation and for further thought upon the impact of the penal law on young offenders who contribute such a large proportion of the incidence of crime.

A second area in which the situation of the defendant is now accorded major legal weight for treatment purposes is that of the repeated or habitual offender. Previous criminal records will often exclude probation as a legal possibility,[73] increase the sentence of imprisonment that may be passed for an offense,[74] raise conduct otherwise a misdemeanor to the grade of felony[75] or make a sentence mandatory that may involve imprisonment for life.[76] There is much variation on these points in the prevailing statutes. What are the norms which should prevail? Should the significance accorded a past conviction have a limitation

[69] MODEL YOUTH CORRECTION AUTHORITY ACT (1940).

[70] 18 U.S.C. §§ 5005–24 (Supp. 1951); CAL. WEL. & INST. CODE §§ 1701 *et seq.* (1944); MASS. ANN. LAWS c. 119, §§ 52 *et seq.*, c. 120 (Supp. 1948); MINN. STAT. § 260.125 (Supp. 1951); TEX. REV. CIV. STAT. ANN. art. 5143 (Supp. 1951); WIS. STAT. c. 54 (1949).

[71] See N.Y. CODE CRIM. PROC. § 913-e *et seq.*; N.Y. CORRECTION LAW §§ 60, 61.

[72] See BECK, FIVE STATES (A.L.I. 1951); Comment, *Youth Correction—The Model Act in Operation*, 17 U. OF CHI. L. REV. 683 (1950).

[73] *E.g.*, PA. STAT. ANN. tit. 19, § 1051 (1930); *cf.* N.Y. PEN. LAW § 2188.

[74] *E.g.*, N.J. STAT. ANN. tit. 2, § 103–7 (1939); N.Y. PEN. LAW §§ 1941, 1942.

[75] *E.g.*, MINN. STAT. ANN. § 610.28(1) (1947); N.Y. PEN. LAW § 408.

[76] *E.g.*, N.Y. PEN. LAW § 1942.

based on time? Is the nature of the crime important or is it sufficient to distinguish between felonies and misdemeanors, as the statutes usually do? If that distinction is retained, what ought to be the test of felony? Should there be comparable provision for the repeating misdemeanant, such as the petty thief with a long record of convictions? [77] Would it be better to abandon any automatic standards based on prior record and to call for an adjudication that the individual is an habitual offender? If so, what should support a finding of this order and what should its treatment consequences be? An important aspect of the problem involves the professional criminal, who may have been successful in avoiding serious convictions and be brought to book for relatively minor crimes. Can any special measures be devised for dealing with this type of individual that would not cost more than they may be worth? [78] These issues are particularly challenging in view of high recidivism rates, the large proportion of our prison inmates who have been convicted of repeated crime and the widespread concern about professionals in gambling, vice, narcotics and related fields.

Some would insist that the right course for legislation is to sweep away all statutory variation in the applicable sanctions, especially that resting on the nature of the crime, applying to adults the principles urged by the Institute in dealing with the young offender. In this view, the sole objective is to meet whatever future danger is presented by the individual, employing rehabilitative means so far as possible but authorizing the continuation of restraint so long as there is ground for apprehension of repeated crime.

The position raises major issues of both ends and means. In the first place, is our society prepared to focus in all cases on the character of the offender, foregoing all concern for general deterrence of the crime, except as it may be served incidentally by the fact of a conviction and the modes of treatment calculated to safeguard against the future criminality of the defendant? There certainly are many cases in which judges now feel obliged to impose a sentence of imprisonment, for the sake of example, where no commitment would be indicated if this principle were now in

[77] *E.g.*, ILL. REV. STAT. c. 38, § 393 (1951) (a second conviction of petty larceny leads to a penitentiary term of one to three years, whereas the first offense only leads to a term in the county jail for less than a year).

[78] See REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON ORGANIZED CRIME 21–24 (1951).

force. In the second place, should we be willing to permit commitments that involve a possibility of life imprisonment unless there has been some overt behavior of sufficiently significant dimensions to comprise a major crime? In the third place, can the behavior sciences predict the future with sufficient evenness and accuracy to justify dispensing with all legislative standards as guides to and controls on dispositions? Finally, even in judging the offender and his probable potentialities, are not the nature and circumstances of the crime important factors to be weighed? Would a psychiatrist treating a patient who had made a suicide attempt or found himself disposed to exhibitionism ignore the character of the behavior symptom in his diagnosis and prognosis of the case?

These considerations may establish that it is unwise to affirm any single object as the purpose to be sought in all determinations of the treatment of offenders; that complete discretion as to treatment is impolitic and some statutory ordering and limitations necessary; that, finally, in such an ordering both crime and criminal should be accorded weight. If that is so, the questions to be faced are: what discriminations should be made upon the legislative level and what consequences should they have?

Fresh thought upon these problems may, of course, conclude that legislation ought to play a very different part in dispositions than is now attempted in most jurisdictions. It may be, for example, that control by rule should be restricted to delineation of some major categories implying very different modes of disposition, recognizing that within such limits main responsibility must rest upon administration. Further efforts to guide administration and to safeguard its equality may be less wisely focused upon rules than on improvement of procedures and on stating policies and factors to be weighed in exercising such discretion as the law confers.

C. Methods of Treatment and Discretion in Their Use

(1) *Methods of Treatment.* — The methods of treatment prescribed or authorized in dealing with offenders typically range from the extreme affliction sanctions — death or life imprisonment — through prison terms of every possible duration, served in many different types of institutions, to dispositions that do not involve commitments, namely probation, mere suspended sentence or a fine. While this is true in general, much law of quite surprising difficulty and complexity must usually be examined to construe the

precise legal possibilities in any given jurisdiction. To gauge the meaning of the possibilities, in light of current practice, calls for surveys that upon the whole are rarely made.[79]

Among the many issues that demand consideration are the following:

Should the death penalty be retained as the highest sanction? Viewed nationally there have been in recent years between 100 and 150 executions annually.[80] Can the dispatching of these individuals, their selection determined by incalculable chances, make sufficient contribution to prevention to outweigh the brutalizing and sensational factors involved in taking life? Is it meaningful upon the issue of prevention that Rhode Island is an abolition state without its homicide rate comparing unfavorably with that of Massachusetts or that Michigan's does not suffer by contrast with that of Illinois? This is an issue that merits a larger hold upon the mind and conscience of the country than it has received in recent years.

What types of institutional commitments ought to be permitted by the system and what should their limits be? One aspect of the problem involves asking what diversity of institutions, in nature, program and equipment, represents a valid norm for present-day America: what represents a norm regarded as ideal? How far below these norms are our facilities in general and what adaptations must in consequence be made? To what extent is it now meaningful to prescribe rehabilitative treatment in state institutions and what progress can be made to make this real? In view of the adverse reports on local jails and lock-ups, when should such commitments be permitted on conviction, if at all? When should a fine be authorized as an alternative or an addition to imprisonment; what should its limits be and what the consequences of nonpayment or of inability to pay?

Probation now accounts for a large proportion of all dispositions,[81] representing what perhaps may be the most important modern contribution in the treatment field. It is, of course, not one method of treatment but a great variety of methods, depending upon the conditions that are imposed and the extent and quality of

[79] See, *e.g.*, I–IV U.S. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939).

[80] Executions in the United States in 1947 numbered 152; in 1948, 118. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 143 (1951).

[81] Of 37,675 dispositions in 86 United States district courts in the year ending June 30, 1950, 16,046 were probations as compared with 14,435 imprisonments. *Id.* at 39.

supervision it implies. Should probation be excluded as a legal possibility in any situations and, if so, in which? What criteria should govern a determination to employ probation, to what extent and in what terms should they be stated in the statute? What type of information ought to be required as a pre-condition of the order? Is it now feasible to use prediction tables and, if so, who should construct them and how can they best be drawn? [82] What conditions ought to be permissible in a probation order: restitution, reparation, psychiatric treatment, change of business or employment, restrictions on movement or companions, altered family life, some type of training? Should a defendant have the right to review of an invidious condition? What should the period of probation be and when should it be settled? What grounds ought to suffice for revocation of probation; what consequences should the revocation have and what safeguards be provided the probationer? Should probation be available before conviction — on consent of the defendant — thus avoiding any formal record of conviction? Given success upon probation, should the record of conviction be impounded in an effort to allay the future stigma when rehabilitation seems secure? Finally — and perhaps the most important — to what extent are genuine probation services available and can the statutes make a contribution to advancing their development in areas where there is need for the advance?

Attention should be given to the law that governs incidental consequences of conviction, such as civil death [83] and loss of civil rights.[84] To what extent should such results be automatic and what standard should determine when the loss occurs: the nature of the crime, possible sentence, actual disposition, formal order of the court? How and on what grounds should disabilities once suffered be removed? Here, as in other situations, the distinction between felony and misdemeanor ought to be examined with an eye to asking whether we do not permit too much to rest upon this one distinction and how such lines, in any case, ought to be drawn.

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[82] See, *e.g.*, S. & E. GLUECK, UNRAVELING JUVENILE DELINQUENCY 257 *et seq.* (1950).

[83] *E.g.*, CAL. PEN. CODE § 2601 (1949); MINN. STAT. ANN. § 610.34 (1947) (only in cases of life imprisonment).

[84] This generally consists merely of loss of franchise permanently, *e.g.*, IOWA CONST. Art. II, § 5 (1857); ORE. CONST. Art. II, § 3 (1859), although such rights may be restored by pardon. In states where civil death is applied, there is also a provision for suspension of all civil rights during imprisonment. *E.g.*, CAL. PEN. CODE § 2600 (1949); ORE. COMP. LAWS ANN. § 23-1406 (1940).

Can any contribution be made to rationalization of the petty penal sanction, including those employed for violation of administrative regulations? While it would be unwise to seek to deal with the substantive content of this multitude of prohibitions and commands, resort to penal law for their enforcement presents problems common to the diverse rules to be enforced. Is it possible and useful to attempt to prepare unified provisions that would be incorporated in the penal code and offered as a substitute for varying and widely scattered sanctions now in force? Should short prison sentences, intended only as deterrents, be employed and, if so, in what type of institution should such sentences be served?

(2) *Limitations on Discretion.* — The modern penal law confers immense discretion as to treatment on the court or other organs of administration but there are nonetheless important limits on the scope of the discretion now conferred. The death sentence, for example, must still be passed for murder in the first degree in two states.[85] In the others there is a discretion in the jury (or in uncontested cases in the court) to mitigate the penalty but usually only to the fixed alternative of life imprisonment.[86] Maximum prison terms are prescribed everywhere and in all situations, though it should be added that the maxima are frequently too high to be regarded as real limitations. Statutory minima or mandatory definite sentences are rarer but exist in other situations besides murder; their length, however, usually is deceptive in view of good time allowances and provisions that permit release upon parole. There are, moreover, varied limitations on the power to forego imprisonment entirely by suspending sentence, with or without ordering probation. Needless to say, these statutory mandates differ greatly in their number, grounds and content in different states.

The questions to be faced within this area have for the most part been set forth above. Should the statutes embody any mandates as to treatment and, if so, what kind and when? Insofar as discretion is desirable, what alternatives should be allowed? Would penologists approve some minimal duration of commitment as

[85] N.Y. PEN. LAW § 1045 (except for felony murder where the jury may recommend life imprisonment); VT. REV. STAT. § 8242 (1947). The mandatory system was abandoned in North Carolina in 1949, N.C. Laws, 1949, c. 299, § 1; and in Connecticut and Massachusetts in 1951, CONN. GEN. STAT. tit. 64, c. 417, § 1406b (Supp. 1951); Mass. Acts 1951, c. 203.

[86] See Andres v. United States, 333 U.S. 740 (1948). The state statutes are collected in the concurring opinion of Mr. Justice Frankfurter. *Id.* at 767.

intrinsic to the profitable use of different types of institutions and, if so, what periods should be prescribed? Should it be possible to hold a prisoner beyond the statutory limit on a showing that his release involves calculable danger of continued criminality; if so, what kind of showing should be necessary, who should judge it and what sort of extension or commitment be allowed? Finally, can and should the legislature seek to deal with the broad field in which discretion is now exercised informally by reduction of charges or acceptance of a lesser plea? Can the need for such devices be eliminated or, if not, can the procedures they involve be formalized or otherwise improved?

(3) *Selection of Agency to Exercise Discretion.* — Since much discretion as to treatment is inevitable and desirable, the most important question to be faced is in what agency or agencies it ought to be reposed. Prevailing law and practice involve many different modes of distribution of authority between the courts and other organs of administration, *e.g.*, prison authorities, parole boards and correction departments, the chief executive; and there is much variety in the nature and procedure of the administrative agencies involved.

Control of the admission to probation remains everywhere in the court of conviction, and decision to imprison is made there. But there is infinite diversity in the extent to which the court controls the place and duration of commitment.[87] In California, for example, on a prison sentence the duration of commitment is determined solely by a centralized administrative authority within statutory limits;[88] often the limit is not set until after successful release on parole. In some states the court may set a minimum but not a maximum;[89] in others both may be fixed in the sentence (subject to different rules as to the spread and subsequent reductions);[90] in Illinois, the court's determination may be altered by a majority vote of the board of parole in the State Division of Correction;[91] in still others the court has a choice between a fixed and indeter-

[87] See, *e.g.*, Beattie and Tolman, *State Sentencing Practices and Penal Systems* in REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME 81 (1942); I U.S. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939); Note, *Indeterminate Sentence Laws — The Adolescence of Peno-correctional Legislation*, 50 HARV. L. REV. 677 (1937).

[88] CAL. PEN. CODE §§ 1168, 3020 (1949).

[89] *E.g.*, MICH. COMP. LAWS § 769.8 (1948).

[90] *E.g.*, PA. STAT. ANN. tit. 19, § 1057 (1930) ("indeterminate sentence" with a statutory maximum and a minimum of ½ of maximum).

[91] ILL. ANN. STAT. c. 38, §§ 802, 810, c. 127, § 55b (Supp. 1951).

minate commitment; [92] and there are states in which a fixed sentence or a sentence determined by the jury is the rule.[93] The same jurisdiction may, of course, require or permit different methods in different situations, depending on such factors as the crime, previous record or the age of the offender or the institution to which he has been committed.

It is widely urged that the responsibility for the determination of the treatment of offenders should not, in any case, be vested in the courts; that judges have no special expertise or insight in this area that warrants giving them decisive voice; and that they should be superseded by a dispositions board that might include the judge but would draw personnel of equal weight from social work, psychiatry, penology and education.[94] The merits and the implications of this frequently reiterated proposition ought to be fully explored. It cannot be explored, moreover, in a vacuum. The case for and against judicial control may be one thing if judicial power is confined to governing admission to probation as opposed to indeterminate commitment, but something very different if the judge is to award a fixed sentence. The case may vary greatly if judicial practice is to sentence without further inquiry or if a competent presentence study is required and provided as an aid.

It should be added that establishing a dispositions board does not resolve the problem of the scope of its authority and that to be accorded other organs of administration, like parole boards, prison officials and the agency that supervises institutions. What is involved, in short, is not alone the question of who ought to be empowered to make the decisive judgments as to treatment but also when such judgments should be made, the data on which they ought to be founded and the policies and objects that should be pursued.

If some judicial control is desirable or inevitable, what are the most acceptable alternatives for definition of its scope and what

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[92] *E.g.*, S.D. CODE § 13.0601, .0609 (1939).

[93] *Cf.* LA. REV. STAT. ANN. § 15:529 (1950) (determinate sentence of imprisonment imposed by court); IOWA CODE § 789.13 (1950) ("indeterminate sentence," limits set by statute not by court); GA. CODE ANN. § 27–2502 (Supp. 1951) (minimum and maximum prescribed by jury; court may grant probation); TEX. CODE CRIM. PROC. ANN. arts. 502 (1926), 693 (1941) (jury fixes punishment in all cases where not absolutely fixed by law).

[94] See, *e.g.*, Glueck, *Principles of a Rational Penal Code* in CRIME AND CORRECTION 72, 95–96 (1952); *cf.* Warner and Cabot, *Changes in the Administration of Criminal Justice during the Past Fifty Years*, 50 HARV. L. REV. 583, 607–08 (1937).

procedural improvements can be made? Wisdom upon this point calls for uncovering and weighing much varied experience under the many different systems now in force. Not all the possibilities, moreover, are reflected in existing law. The Committee on Punishment for Crime of the Judicial Conference (including Judges John J. Parker, Learned Hand and Orie L. Phillips), for example, proposed [95] a method for the federal courts that would preserve judicial power to grant probation and fix the length of sentence (subject to the parole provisions) but still meet the objections that judicial sentencing is based on inadequate knowledge of the offender and involves widespread inequalities in the use of determinative norms. Where the judge is of opinion that the commitment should be more than one year, the proposal calls for an initial sentence for the statutory maximum. The court, however, would retain a power to revise the maximum after receiving a report and recommendation from a Board of Corrections established to make such recommendations to the courts. Sentencing would thus be postponed, in effect, for six months after commitment (or such longer time as the court may allow) to permit institutional study of the offender. The recommendation would reflect the result of such study and whatever norms the Board may have developed for the country as a whole to govern the official response to the crime. Judicial rejection of the recommendation would require a statement of reasons by the court. To what extent would such a plan offer improvement in state systems and to what extent are they to be preferred? Even without this type of initial commitment, what improvement can be effected in sentence practice both to improve the quality of dispositions and to reduce the inequalities that they involve?

There are, moreover, major questions to be asked about release procedures other than their right relationship to judicial control. How should releases be decided, *i.e.*, on what data and by what procedure? Should any releases be unconditional? Should the offender have the right to forego earlier release to avoid supervision on parole? What period of supervision represents a minimum for practical utility, what period a proper norm? What conditions ought to be permitted on parole, who should fix them and how ought they to be enforced? How should parole be terminated? What

[95] See REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME 7 (1942); H.R. 2140, 78th Cong., 1st Sess. (1943); Comment, *Reform in Federal Procedure: The Federal Corrections and Parole Improvement Bills*, 53 YALE L.J. 773 (1944).

rights ought the parolee to have? How can law best contribute to effecting readjustment after release from an institution? These problems are affected by the distribution of authority between the court and other agencies but they arise whatever mode of distribution is in force.

Much thought has been given in recent years to every aspect of the treatment of offenders. What is required is to bring this thought together in the context of a comprehensive survey and analysis, concerned with statutory prescriptions and limits, the scope and distribution of discretion, the opportunity to guide the exercise of discretion and the nature and procedures of the agencies in which discretion is reposed. Only the broadest inquiry into the underlying legislative questions, free from programmatic precommitments, can bring unity of insight and of purpose in this wide and most chaotic field.

III. The Possibilities and Limitations of a Model Code

The American Law Institute project contemplates a systematic re-examination of the issues sketched above, in the context of the preparation of a model code. The object is to canvass the existing law and practice, articulating legislative issues, analyzing possible solutions and appraising the competing values and considerations which a legislative choice should weigh. To the extent — and the extent is large — that legislative choice ought to be guided or can be assisted by knowledge or insight gained in the medical, psychological and social sciences, that knowledge will be marshalled for the purpose by those competent to set it forth. The project should, at least, permit the law to join with other disciplines in the production of a treatise on the major problems of the penal law and their appropriate solutions from which future legislation, adjudication and administration may be able to draw aid. The hope is to produce a commentary that will help to place the systematic literature of our penal law upon a parity with that of well-developed legal fields. The model code itself will represent the practical embodiment of the conclusions of the study, in the form best calculated to promote their use. It will assure, moreover, that attention will be given not alone to substance in solutions recommended but also to the drafting problems they present — a matter of substantial import in a field where legislative drafting on the whole is at its lowest level and the drafting difficulties are immense.

The way a model code extends the influence of the conclusion of a study is illustrated by the famous work of Sir James Fitzjames Stephen. Stephen's *General View* and *Digest* [96] have been British judges' handbooks from their publication, but Stephen's impact on the course of legislation rests far more on the draft code that he prepared for a Royal Commission [97] after his exploratory work was done. Though Parliamentary interest was too ephemeral for its enactment as a whole, it was the basis for important English legislation in some fields. More important, it was the main source employed in drafting the Criminal Code of Canada of 1892 [98] and played a major role in the numerous other formulations for the British colonies and the dependencies.[99] Similarly, Macauley would not have shaped British penal legislation for India by a commentary alone, but his *Notes* together with a draft law [100] produced enactment in 1860, twenty-two years after their completion.[101] One may doubt also whether Macauley and a host of other Europeans would have weighed so carefully the views on penal law of Edward Livingston if he had not presented them with the proposal of a code.[102] Would New York in 1881 have legislated on the basis of Field's thought of 1865 [103] unless he had prepared a model draft? The point is simply that when legislation is in prospect legislators do not seek a treatise but a legislative model. Nothing, indeed, could make this clearer than the Institute's experience with the Model Youth Authority Act.[104] It is the draft that gave an impetus to legislation in the states that have now moved in the direction urged.

There are, to be sure, important special difficulties to be met in the delineation of the scope of any model code. Whether behavior

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[96] STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (1863), A DIGEST OF THE CRIMINAL LAW (1877).

[97] See REPORT OF CRIMINAL CODE COMMISSION: THE DRAFT CODE (1879); 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND vi (1883); 3 *id.* at 365–67.

[98] The Criminal Code, 1892, 55 & 56 VICT., c. 29, STAT. OF CANADA 137.

[99] For an enumeration of the major codes involved, see MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 1284 (1940).

[100] See A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS 69–138 (1838).

[101] See MORGAN AND MACPHERSON, THE INDIAN PENAL CODE iii (1861); ACHARYYA, CODIFICATION IN BRITISH INDIA 210 (1914).

[102] See LIVINGSTON, A SYSTEM OF PENAL LAW (1833), COMPLETE WORKS ON CRIMINAL JURISPRUDENCE (1873).

[103] See REPORT OF THE FIELD COMMISSION (1865); *cf.* REPORT OF THE COMMISSIONERS (1878).

[104] MODEL YOUTH CORRECTION AUTHORITY ACT (1940).

ought to be made criminal may be affected by variations in social conditions and public attitudes from state to state. What treatment method ought to be employed may be in part a function of such factors as well as of such other variables as crime rates, the character of population, public budgets, facilities and personnel.[105] It is essential, therefore, to confine the projected code to areas where such variety does not preclude a uniform solution or else to meet this difficulty by the presentation of alternative solutions adapted to the various conditions posed. There will be need, in any case for such use of alternatives since many legislative choices may so largely turn on matters of opinion that the Institute will not be ready to endorse a single answer to the question raised. Where that is so, the commentary supplementing the code provision will provide a full discussion of the reasons for this mode of presentation, marshalling the relevant considerations on the issue that the draft does not resolve.

Within such limits the enterprise will have an ample scope; they will, indeed, do little more than assure that emphasis is placed where it should be in any case, namely, on the pervasive problems posed in shaping law to deal with the serious injuries and threats to vital human interests rather than the vast, heterogeneous mass of special legislation declaring this or that conduct a crime, subject to minor penalty. Neither the human personality nor the largest requirements for its protection nor its sense of justice nor its most malevolent aggressions differ very markedly from state to state. It is with them and their legal implications that the model code should mainly be concerned. Within that area, at least, it should be possible to surmount difficulties by alternative provisions where there is no single answer to be found.

A second difficulty derives from the present state of the behavior sciences; it has been argued that a formulation at this time is premature. But granting that we may expect significant advance in scientific insight concerning both the causes and control of human conduct, it is none the less important to attempt fully to use the insights we now have. Work done today is subject to revision in the future in light of changes in the state of knowledge, and present conclusions can, in any case, be cast in forms most suited to assimilate such changes as they occur. More than this, however, only by systematic study of the penal law and its pervasive prob-

[105] See Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319 (1938).

lems can we appraise the relevancy of behavior science in this field. What is required is sustained analysis, sorting the ethical, political, technical or practical aspects of problems from their scientific aspects, in the sense of the behavior sciences. Such an analysis has been too long delayed.

Given a sound analysis of this dimension, there is every reason to believe that proper canvass of the fruits of special medical and psychological knowledge will have important impact on the law. By the same token, to conduct the canvass in the context of the concrete legislative problems is an ideal way to judge the status and the implications of behavior science for this enduring form of social action and control.

It would, to be sure, be unfortunate if the enterprise should operate to "freeze" existing law or practice into rigid mold without exploration of the larger underlying questions. The basic purpose of the project is, however, the reverse: *i.e.*, to judge existing practice in the light of all the knowledge that can be obtained. The tendency of such an enterprise is necessarily to "unfreeze" more than it can tend to "freeze." But if, and insofar as, candid study leads to the conclusion that social judgments reflected in penal law rest on grounds unlikely to be touched by changes in the state of scientific knowledge,[106] there is important gain in recognizing this to be the case. Not the least of the results of such a finding is that it may further education with respect to the intrinsic limitations of the penal law, as distinguished from other and less oppressive, more constructive methods of protection and control. This too would constitute a genuine advance.

[106] *Cf.* Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).